In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1778

STANDARD OIL COMPANY OF CALIFORNIA; AMERADA HESS CORPORATION; GULF OIL CORPORATION; MARATHON OIL COMPANY; PHILLIPS PETROLEUM COMPANY; and STANDARD OIL COMPANY (OHIO),

Petitioners,

vs.

STATE OF FLORIDA EX REL. SHEVIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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Table of Contents

Table of Authorities

Cases

Constitutions

Statutes

Other Authorities

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this action, dated January 22, 1976.

OPINIONS BELOW

A copy of the opinion of the Court of Appeals, reported at 526 F.2d 266, is appended hereto (Appx., p. A1).

Also appended are copies of the notice of the Court of Appeals' order denying rehearing *en banc* (Appx., p. A23); the order of the United States District Court for the Northern District of Florida, dated July 22, 1974 (the decision reviewed by the Court of Appeals; Appx., p. A25); and the district court's related order of November 30, 1973 (Appx., p. A27).

JURISDICTION

The decision of the Court of Appeals was entered January 22, 1976. A timely petition for rehearing *en banc* was denied on March 10, 1976 (529 F.2d 523; Appx., p. A23). This petition was filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The majority of the Court of Appeals refused to certify to the Florida Supreme Court for decision the question of the authority of the Florida Attorney General to institute a massive Federal antitrust action in Federal court, allegedly in behalf of all the departments, agencies, and political subdivisions of the state, but without any authorization from the governmental entities he purported to represent. The question is whether, in refusing to certify to the Supreme Court of Florida this state-law question of vital local concern, the Court of Appeals unacceptably failed to make proper use of the certification procedure to promote sound judicial administration and a cooperative Federalism.

STATUTES INVOLVED

A copy of Florida Statutes, § 25.031, providing for Federal court certification of questions to the Supreme Court of Florida for decision is appended (Appx., p. A34).

STATEMENT OF THE CASE

Petitioners are oil company defendants in a massive antitrust action instituted by the Attorney General of Florida in the United States District Court for the Northern District of Florida. The Attorney General purported to sue on behalf of the state, and all departments, agencies, and political subdivisions of the state. As the Court of Appeals noted, the complaint "alleged a worldwide scheme of anticompetitive activities in the production, transportation, refining and marketing of petroleum and petroleum products. The Attorney General seeks treble damages, divestiture, and injunctive and declaratory relief" (Appx., p. A1 n.1).

Defendants moved to dismiss the complaint on the ground that the Attorney General of Florida, under Florida law, lacks the authority to initiate such a broad-sweeping Federal cause of action in Federal Court without any authorization from the state departments, agencies, and political subdivisions on whose behalf he is allegedly suing. Under the Florida Constitution (Art. IV, § 4; Appx., p. A35) the Attorney General is only one of six elected officers of the state Cabinet who, together with the Governor and the Lieutenant Governor, exercise the primary executive power of the State (Art. IV, § 6; Appx., p. A36).

The district judge stayed the action to permit the Florida Attorney General to bring an action for declaratory judgment in Florida state court to resolve the question of his authority, observing that "throughout the history of Florida * * * there is great doubt as to the outer perimeter of the authority of the Attorney General" (Appx., p. A28), and that "the all-important question which is before this Court has not been directly put to the Florida courts" (Appx., p. A31).

The Attorney General advised the district court that he did not intend to seek such declaratory relief. The district court then dismissed plaintiff's action on the ground that there was "nothing in the record to show any action by the legislature or even the Cabinet of the State of Florida, or any agency, department or political subdivision of the State of Florida, authorizing the institution of this suit" (Appx., p. A26).

On appeal, a divided panel of the Court of Appeals declined to certify the question to the Supreme Court of Florida, and on the merits reversed the district court and sustained the authority of the Florida Attorney General, relying on perceived inherent common law powers of the Attorney General. The panel nevertheless conceded that "only the Florida Supreme Court can decide this state law question in a manner that is, by definition, correct" (Appx., p. A16). The dissenting judge urged that the question be certified:

> "Under my concept of federalism, that Tribunal should be the one to delineate the authority, power, and duties of its Attorney General * * * especially where, as here, the authority is not express and, at the best, can only be supplied by implication" (Appx., pp. A20-A21).

REASONS FOR GRANTING THE WRIT

The proper use of the certification procedure is a question of rapidly increasing importance in the Federal courts. No less than 14 states now permit certification[1] and this recent and accelerating trend can only be expected to continue. Yet despite the fact that the certification device offers immense potential for the realization of a "cooperative judicial Federalism,"[2] and for promoting sound and efficient judicial administration in an era of unprecedented docket pressure in the Federal courts, the decisions of this Court (e.g., *Lehman Brothers* v. *Schein* (1974) 416 U.S. 386; *Clay* v. *Sun Insurance Office* (1960) 363 U.S. 207) offer little concrete guidance on the standards that should govern its use.

I. THIS COURT SHOULD PROVIDE ADDITIONAL GUIDANCE FOR THE PROPER USE OF THE RAPIDLY EMERGING CERTIFICATION PROCEDURE

The present decision refusing to submit to the Supreme Court of Florida a decision peculiarly within its competence, and of vital concern to the state, even if it could be justified in the context of abstention, evidences a basic misconception of the proper use of the "remarkably help-

[1] Alabama, Colorado, Florida, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, Oklahoma, Washington. The adoption of the Uniform Certification of Questions of Law Act in 1967 (12 Uniform Laws Annotated 49) can be expected to promote even greater proliferation of state provisions for certification. Prior to 1965, only Florida permitted certification.

[2] Kurland, Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine (1959) 24 F.R.D. 481, 488-489.

ful certification procedure" (*Martinez* v. *Rodriquez* (5 Cir. 1969) 410 F.2d 729, 730).

A major deterrent to abstention by the Federal courts has been the prolonged delay that that procedure may occasion (see *England* v. *Medical Examiners* (1964) 375 U.S. 411, 423; Douglas, J. concurring). Certification, in contrast, involves significantly less expense and delay. It achieves the desirable benefits of abstention without the accompanying logistical problems. For this reason it should be more generously approached (*England* v. *Medical Examiners* (1964) 375 U.S. 411, 433-435; Douglas, J. concurring).[3] In *Lehman Brothers* v. *Schein* (1974) 416 U.S. 386, this Court observed that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism" (416 U.S. 391). It therefore ordered reconsideration of certification, despite the holding of *Meredith* v. *Winter Haven* (1943) 320 U.S. 228, that difficulties of ascertaining state law do not in themselves justify abstention (320 U.S. 234).

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[3]The commentators have frequently pointed to certification as a solution to the delay and expense accompanying abstention. See, e.g., Commissioners' Prefatory Note, Uniform Certification of Questions of Law Act, 12 Uniform Laws Annotated 49-51; American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (1968), Commentary, pp. 292-296; Vestal, The Certified Question of Law (1951) 36 Iowa L.Rev. 629, 643-647; Kurland, Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine (1959) 24 F.R.D. 481, 489; Note, Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use (1969) 22 U.Fla.L.Rev. 21, 27-29.
Compare American Law Institute's proposed codification of the abstention doctrine (Study of the Division of Jurisdiction Between State and Federal Courts (1968) § 1781(c)), with its more liberal provision for certification (§ 1781(e)).
Virtually all of the commentators agree on the pressing need for greater definition of standards.

The Court of Appeals erroneously failed to recognize the immense savings in judicial resources that certification could achieve in this case, with only minor inconvenience to the parties. Indeed, what is at stake is not simply the possibility of an incorrect decision on a question of state law, but the potential that this entire massive action may later be found to have been improper in its inception, resulting in an intolerable—almost incomprehensible—waste of scarce judicial resources (infra, pp. 8-11).

The divergent views of this Court on the question of abstention (compare *Allegheny County* v. *Mashuda Co.* (1959) 360 U.S. 185, with *Louisiana P. & L. Co.* v. *Thibodaux City* (1959) 360 U.S. 25) have produced a vacillating and often conflicting line of decisions. As a leading text puts it, "given the difficulties of understanding and reconciling the Supreme Court decisions, it should not occasion surprise to discover that the court of appeals' decisions on when abstention is proper in state-law cases are not harmonious" (Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) 1005; see also Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in An Activist Era (1967) 80 Harv. L.Rev. 604). It is equally true that there exist widely differing approaches on certification among the judges of the courts of appeals, as illustrated by the sharp divisions in such cases as *United States* v. *Buras* (5 Cir. 1972) 475 F.2d 1370, 1371, certiorari denied (1973) 414 U.S. 865, and *Schein* v. *Chasen* (2 Cir. 1973) 478 F.2d 817, 819, 825, vacated (1974) 416 U.S. 386. In the former case, the dissenting judge observed that "in these times when comity and abstention have become the by-line for

Federal Judges, it is unfortunate that the Fifth Circuit adopts this head-in-the-sand rejection of the State's effort to alleviate our *Erie* burden" (475 F.2d 1375).

No single decision could be expected to resolve these ambiguities. But the plainly erroneous result in this case offers a timely and important opportunity to provide concrete guidance on the proper use of the certification procedure. This Court should grant the petition to mitigate the divergent approaches to this important question.[4]

II. THE MINIMAL DELAY ACCOMPANYING CERTIFICATION IN THIS ACTION PALES IN COMPARISON WITH THE ENORMOUS SAVINGS OF JUDICIAL RESOURCES THAT IT MAY ACHIEVE. THIS COURT SHOULD CLARIFY THE WEIGHT TO BE ACCORDED POSSIBLE DELAY RESULTING FROM CERTIFICATION

In declining to use the certification device, provided "with rare foresight" (*Clay* v. *Sun Insurance Office* (1960) 363 U.S. 207, 212) by the Florida legislature, the Court of Appeals placed heavy emphasis on the potential for delay, which it considered "particularly significant in the context of this case." "[W]e find the price of certainty too high, in terms of delay which may prejudice the plaintiffs' rights to a speedy resolution of the merits" (Appx., pp. A19-A20).

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[4]Compare the restrictive approach of the panel majority in this case with the more liberal decisions of the First Circuit in *Hiram Ricker & Sons* v. *Students Inter. Meditation Soc.* (1 Cir. 1974) 501 F.2d 550, the Seventh Circuit in *Wecker* v. *Kilmer* (7 Cir. 1972) 471 F.2d 782, and another panel of the Fifth Circuit in *Boyd* v. *Bowman* (5 Cir. 1972) 455 F.2d 927. Compare the approach of the Ninth Circuit in a tax case (*Robinson* v. *United States* (9 Cir. 1975) 518 F.2d 1105), with the more liberal approach of the Tenth Circuit in a tax case (*Imel* v. *United States* (10 Cir. 1975) 523 F.2d 853).

The court's basically mistaken and unacceptable approach to certification is nowhere more apparent than in its treatment of possible "delay." The court simply disregarded the disastrous consequences not only for the parties, but for the Federal courts, if this action is permitted to go forward without any authoritative determination of the authority of the Attorney General to maintain it. This is no routine tort or contract action. It is a massive Federal antitrust action that will consume literally millions of dollars and as much as a decade of the time of the congested Federal courts and of the parties. In view of the generally poor record of the Fifth Circuit in predicting local law (infra, p. 14), this immense burden may well be entirely unjustified and avoidable. Yet, several years hence a decision of a Florida court contrary to that of the two-member majority here could nullify all of the proceedings to date.[5] In *Railroad Comm'n* v. *Pullman Co.* (1941) 312 U.S. 496, this Court recognized that the "tentative answer" of a Federal court "may be displaced tomorrow by a state adjudication" (312 U.S. 500). An unhappy example—likely to be repeated with far more serious consequences here—is *Maryland Casualty Company* v. *Hallatt* (5 Cir. 1964) 326 F.2d 275, in which the Fifth Circuit found it necessary to undo trial proceedings consuming over two years in light of an intervening state-court repudiation of its earlier decision.

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[5]There is no final judgment in this action. The decision of the Fifth Circuit is therefore not *res judicata*, even in a declaratory judgment action between the same parties (see, Restatement, Judgments, § 41). The Fifth Circuit has expressly held that "law of the case" must give way to the primacy of state law as declared by state courts (*Maryland Casualty Company* v. *Hallatt* (5 Cir. 1964) 326 F.2d 275, 276-277, certiorari denied (1964) 377 U.S. 932).

Any possible minor delay in the certification process pales to insignificance in comparison with the very real prospect of a later negation of all of the proceedings in this massive action since its inception. The Court of Appeals' narrow approach to the certification procedure must be corrected to preclude the possibility of such an immense and unjustified waste of judicial resources.

The Court of Appeals majority also failed to recognize the increasingly prompt resolution of certified questions by the Florida Supreme Court. In *Hopkins* v. *Lockheed Aircraft Corporation* (5 Cir. 1968) 394 F.2d 656, Chief Judge Brown commended the "workable, administratively efficient and expeditious" (394 F.2d 657) process of certification to the Florida Supreme Court. He observed "in these days of our exploding docket and the unavoidable delay as we try to cope with our overcrowded case load [Shafroth, Survey of the United States Courts of Appeals, 1967] this slight period of time to afford Florida the opportunity to settle the issue presented demonstrates that delay really is not an insurmountable problem in the certification procedure" (394 F.2d 657). Likewise in *National Ed. Ass'n, Inc.* v. *Lee County Bd. of Public Instr.* (5 Cir. 1972) 467 F.2d 447, the court noted the "consistently prompt and well considered answers which our certified questions have thus far evoked" and recognized that certification is a "relatively expeditious way to substitute informed judgment for informed guesses" (467 F.2d 449). These views cannot be reconciled with the approach of the majority here.

The panel majority in this case likewise ignored the fact that certification is a desirable judicial improvement, often commended as a remedy for the delay that has influenced this Court to urge caution in the use of abstention (see *Lehman Brothers* v. *Schein* (1974) 416 U.S. 386, 394; Rehnquist, J., concurring). It frequently operates to *save* time that Federal courts would otherwise spend laboring over decisions they are ill-suited to make. It is, for example, doubtful that proper use of certification would have caused any delay at all in this case.[6] If possible "delay" accompanying the use of the certification process is nevertheless to be given the disproportionate significance it was accorded by the majority below, the basic purpose of the helpful certification procedure will inevitably be frustrated.

[6]If the Court of Appeals had granted the motion of certain appellees to certify the question, filed in October of 1974, the answer to the certified question would in all probability have been received before it rendered the present decision, some 17 months after the notice of appeal was filed, and 13 months after the briefs were submitted.

The procedural complexities engendered by the failure to certify the question are illustrated by the fact that some of the defendants in this action have now commenced an action for declaratory relief concerning the authority of the Attorney General in a Florida Circuit Court (*Mobil Oil Corporation, et al.* v. *Robert L. Shevin, Attorney General,* Second Judicial Circuit, No. 76-950). This trial, the ensuing appellate proceedings, and their potential for ultimately upsetting this action after substantial passage of time, could all have been avoided by certification.

III. THE COURT OF APPEALS FAILED ADEQUATELY TO RECOGNIZE THE SPECIAL COMPETENCE OF STATE COURTS IN DECIDING QUESTIONS OF STATE LAW. THIS COURT SHOULD CLARIFY THE DEGREE OF UNCERTAINTY THAT WARRANTS CERTIFICATION IN THE INTEREST OF SOUND JUDICIAL ADMINISTRATION

A fundamental underpinning of the abstention doctrine has been a due regard for the respective competence of the Federal courts to resolve questions of Federal law, and of state courts to resolve questions of state law. "Abstention is a * * * vehicle for according appropriate deference to the 'respective competence of the state and federal court systems'" (*England v. Medical Examiners* (1964) 375 U.S. 411, 415).

The majority of the Court of Appeals turned their backs on the special competence of the Florida Supreme Court on questions of local law, even though they purported to recognize that "only the Florida Supreme Court can decide this state law question in a manner that is, by definition, correct" (Appx., p. A16). In declining to certify the question, they relied principally on their conclusion that "in our view, this simply is not an extremely close question" (Appx., p. A16). But the majority recognized that no statute or constitutional provision resolves the question. There is likewise no decision of the Florida Supreme Court upholding alleged inherent common law powers of the Attorney General in the same or a closely related situation. Instead, the court reviewed a number of Florida cases from 1868 to date, carrying their language outside of its context in order to predict what the Supreme Court of Florida might do if presented for the first time with a case such as the present (Appx., pp. A6-A14). Clearly this was no simple application of settled state law.[7]

The majority's conclusion that the question is free from doubt is difficult to square with the views of the dissenting judge that "there is much room for doubt that by implication the Attorney General has authority 'prescribed by law' to bring this particular suit, freighted as it is with much expense and potentially heavy court costs" (Appx., p. A22). It is also significant that the district judge, the only judge from Florida to sit on this case, has held that the Attorney General does not have authority under Florida law to institute this action.[8]

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[7] As the district judge pointed out, the Florida Attorney General, as one of six elected Cabinet officers, exercises only that power "prescribed by law" (Art. IV, § 4; Appx., p. A35). Article II, section 3 of the state Constitution further provides that "no person belonging to one branch [of the state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

The majority's principal authorities not only were decided more than forty years ago, but involved the traditional power to maintain proceedings *quo warranto* (*State* v. *S. H. Kress & Co.* (1934) 115 Fla. 189, 155 So. 823; *State* v. *Bryan* (1905) 50 Fla. 293, 39 So. 929; *State* v. *Gleason* (1868) 12 Fla. 190). Those decisions have since been limited to their context by the Florida Supreme Court (*Holland* v. *Watson* (1943) 153 Fla. 178, 14 So.2d 200, 201), and are far removed from the present action. Compare *Green* v. *American Tobacco Co.* (5 Cir. 1962) 304 F.2d 70, 86, certifying the question because "there is no Florida decision precisely in point and so clearly on all fours as to be dispositive of this question or proposition of law."

[8] In this he is in accord with the only other decision on the question (*Point East One Condominium Corporation, Inc.* v. *Point East* (S.D.Fla., Oct. 17, 1974) No. 73-1815-Civ-CA) again by a judge versed in Florida law. Thus, of five judges to consider the authority of the Attorney General to institute a Federal antitrust action on his own initiative, three, including the only two judges from Florida, have disagreed with the conclusion of the majority below that the question is an easy one.

The majority's "considerable confidence" (Appx., p. A16) must also be appraised in light of the consistently poor record of the Fifth Circuit in determining questions of state law. Cataloging the cases in *United Services Life Insurance Company* v. *Delaney* (5 Cir. 1964) 328 F.2d 483, certiorari denied (1964) 377 U.S. 935, Chief Judge Brown observed that "both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering" (328 F.2d 486).[9]

This Court has not hesitated to approach unduly confident predictions of local law with skepticism where other considerations strongly indicated the propriety of abstention (e.g., *Reetz* v. *Bozanich* (1970) 397 U.S. 82, 86-87; *Kaiser Steel Corp.* v. *W. S. Ranch Co.* (1968) 391 U.S. 593; *Harrison* v. *N.A.A.C.P.* (1959) 360 U.S. 167, 176-177). The Court of Appeals should be required to accord greater deference to local courts in a case such as the present, in which the question is of vital local concern and the consequences of a wrong guess may be disastrous. Because the degree of uncertainty necessary for certification "does not emerge easily from analysis of [this Court's] decisions" (Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) 991), this Court

[9]For a more recent review of erroneous predictions of state law, see the dissent in *W. S. Ranch Company* v. *Kaiser Steel Corporation* (10 Cir. 1967) 388 F.2d 257, 262, 264-265 and nn. 11-15, reversed per curiam (1968) 391 U.S. 593. Some notable examples are *Green* v. *American Tobacco Company* (5 Cir. 1963) 325 F.2d 673, 674, certiorari denied (1964) 377 U.S. 943 ("[certification] has saved this Court * * * from committing a serious error * * * which might have resulted in a grave miscarriage of justice"); *Martinez* v. *Rodriquez* (5 Cir. 1969) 410 F.2d 729, 731 n. 5 ("we have been saved from numerous wrong guesses"); *Life Insurance Company of Virginia* v. *Shifflet* (5 Cir. 1967) 380 F.2d 375.

should grant the petition to clarify the proper use of the certification procedure.

IV. THE COURT OF APPEALS IMPROPERLY FAILED TO RECOGNIZE THE PARAMOUNT INTEREST OF FLORIDA IN RESOLVING A SENSITIVE INTERNAL QUESTION OF THE SEPARATION OF POWERS. THIS COURT SHOULD CLARIFY WHEN THE IMPLICATION OF AN IMPORTANT STATE POLICY JUSTIFIES CERTIFICATION

This action presents a sensitive and important local issue of separation of powers which is properly for the Supreme Court of Florida to resolve.[10] It is a question going to the basic political structure of the state. Just as in *Louisiana P. & L. Co.* v. *Thibodaux City* (1959) 360 U.S. 25, the present question is "intimately involved with the sovereign prerogative," especially because it concerns "the apportionment of governmental powers" among the branches of government (360 U.S. 28). Just as in *Kaiser Steel Corp.* v. *W. S. Ranch Co.* (1968) 391 U.S. 593, the question is "one of vital concern" to the state (391 U.S. 594).[11] On this ground alone, the question should have been certified in this case.

[10]This Court has been vigilant to prevent small as well as large encroachments on the separation of powers which lies "at the heart of our Constitution". (*Buckley v. Valeo* (1976) 96 S.Ct. 612, 682; see *Youngstown Co.* v. *Sawyer* (1952) 343 U.S. 579, 635). In our Federal system, similar questions under Florida law should be decided by the highest court of that state.

[11]And see, *Reetz* v. *Bozanich* (1970) 397 U.S. 82, 87 ("a matter of great state concern"); *Alabama Comm'n* v. *Southern R. Co.* (1951) 341 U.S. 341, 347 (an "essentially local problem"); *Burford* v. *Sun Oil Co.* (1943) 319 U.S. 315, 332 ("so clearly involves basic problems of Texas policy" that "Texas courts [should have] the first opportunity to consider" the question).

The present case is thus far different from *Propper* v. *Clark* (1949) 337 U.S. 472, which presented no issue of comparable local importance. Additionally, *Propper* involved the use of the more

The Court of Appeals' majority purported to recognize that "this point has some validity" (Appx., p. A18), but went on to minimize considerations of comity because "the fact that this is primarily a federal case, and one which has not been 'lured' into federal court by means of the diversity jurisdiction, renders considerations of federal-state comity" less persuasive (Appx., p. A19). This reasoning finds not the slightest support in any of the decisions of this Court, which have applied the same standards in Federal question cases as in diversity cases (see *Askew* v. *Hargrave* (1971) 401 U.S. 476; *Harrison* v. *N.A.A.C.P.* (1959) 360 U.S. 167; cf. *Leiter Minerals, Inc.* v. *United States* (1957) 352 U.S. 220). The "distinction" if anything cuts the other way. As noted commentators have observed, "since a major purpose of the [diversity] jurisdictional grant is to provide a neutral forum for the determination of state law issues" this purpose arguably "would be undermined by abstention" (Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) 989).[12]

cumbersome abstention, rather than the certification procedure, and at best would have resulted in the avoidance of the decision of a Federal question. In the present case, certification may entirely avoid the immense burden of a massive antitrust action on the congested Federal docket. And, it is too late in the day to suggest that certification should be limited to cases in equity (337 U.S. 491), or to those in which a Constitutional issue may be avoided (337 U.S. 489; see *Kaiser Steel Corp.* v. *W. S. Ranch Co.* (1968) 391 U.S. 593; *Louisiana P. & L. Co.* v. *Thibodaux City* (1959) 360 U.S. 25).

[12]The Court of Appeals also relied on its deference to the opinion of the Attorney General, and the fact that he had proceeded in the action "without apparent opposition" from the governmental entities purportedly represented (Appx., p. A18). But the former can have little weight in a separation of powers controversy where the Attorney General's own powers are at issue, and the latter has no significance in view of the obvious political implications of publicly opposing the Attorney General in an action such as this once it has been commenced.

The present decision is not simply erroneous, it is totally incongruous in light of the marked enthusiasm with which other panels of the Fifth Circuit have certified questions of far less local importance in diversity actions, despite *Meredith* v. *Winter Haven* (1943) 320 U.S. 228.[13] The Court of Appeals' effort to minimize the considerations of comity which are self-apparent in this case is clear evidence of its unacceptably restrictive attitude toward the use of the certification procedure.

This Court has stated that the need to resolve "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" (*Colorado River Water Conservation District* v. *United States* (1976) 96 S.Ct. 1236, 1244) will justify abstention. If the present question does not meet this standard, it is difficult to imagine one that does. This Court should grant the petition to make clear that the presence of policy questions of vital local importance strongly commends the use of the certification procedure.

[13]E.g., *Barnes* v. *Atlantic & Pacific Life Ins. Co. of Amer.* (5 Cir. 1975) 514 F.2d 704; *Hopkins* v. *Lockheed Aircraft Corporation* (5 Cir. 1968) 394 F.2d 656; and *Martinez* v. *Rodriquez* (5 Cir. 1968) 394 F.2d 156.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

Appendix

United States Court of Appeals
Fifth Circuit.

No. 74-3309

State of Florida ex rel. Robert L. Shevin,
Attorney General,
Plaintiff-Appellant,
vs.
Exxon Corporation et al.,
Defendants-Appellees.

[Jan. 22, 1976.]

Appeal from the United States District Court
of the Northern District of Florida.

Before TUTTLE, THORNBERRY and
COLEMAN, Circuit Judges.

THORNBERRY, Circuit Judge:

In July of 1973, the State of Florida through its Attorney General commenced an ambitious and highly publicized antitrust action against seventeen major oil companies[1] in federal district court. Among the preliminary questions raised by the defendants was the right of the Attorney

[1]The complaint, under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970), and §§ 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14, 18 (1970), alleged a worldwide scheme of anticompetitive activities in the production, transportation, refining, and marketing of petroleum and petroleum products. The Attorney General seeks treble damages, divestiture, and injunctive and declaratory relief.

General, under Florida law,[2] to initiate this action without explicit authorization from other departments, agencies, and political subdivisions of the state.[3] Prior to ruling on the many other motions before it, the district court sought to resolve this threshold issue by staying the action in order for the Attorney General to obtain a declaratory judgment in the Florida courts. The Attorney General, deeming Florida law clear on the point, instead prosecuted an abortive appeal to this Court, which we dismissed without opinion for lack of a final order. The district court has since removed this obstacle, dismissing the action as one beyond the Attorney General's authority.

This appeal followed, with the Attorney General vigorously asserting his right to institute the lawsuit and the defendants contesting it. The oil companies, however, do not forcefully urge affirmance of the district court; they argue instead that the issue is a delicate and difficult one of state law which should be certified to the Florida Supreme Court for its definitive decision. We decline to do so under the circumstances here presented and find the Attorney General to be properly in federal court on behalf of Florida. We therefore reverse.

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[2]Although state law determines this issue, it should be noted that jurisdiction in the action is founded solely on 15 U.S.C. §§ 15, 26 (1970)—the federal antitrust laws—and that the diversity jurisdiction of the federal courts has not been invoked.

[3]Although the suit is in the name of the state as a whole, it seeks to recover damages allegedly suffered by the state as a consumer, which have accrued directly to the constituent units of the state—its "agencies, departments, and political subdivisions."

I.

The office of attorney general is older than the United States and older than the State of Florida.[4] As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion;[5] the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

As a result, the attorneys-general of our states have enjoyed a significant degree of autonomy.[6] Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at

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[4]Although the king appeared in court by his attorney even in the earliest period of English legal history, it was not until the sixteenth century that powers were consolidated in a single attorney who could be called "the chief representative of the crown in the courts." VI W. Holdsworth, *A History of English Law*, 457-61 (2d ed. 1971).

[5]*See* VI W. Holdsworth, *supra* note 3, at 466-69, 470; XII *id.* 305.

[6]This is particularly true where, as in Florida and most of our states, the attorney general is an official independently elected by the people. The significance of the attorney general's status as an official directly chosen by the people was recognized by Justice Ervin of the Florida Supreme Court in these terms:

> The Attorney General is elected by the people; he is entrusted by them with the common law power to legally represent them or some of them in matters deemed by him to affect the public interest. . . . *Regardless of the effectiveness of his efforts in particular public legal situations, at least the people have the continuing satisfaction of knowing that their elected Attorney*

common law.[7] There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.[8] And the attorney general has wide discretion in making the determination as to the public interest.[9]

Thus it can be seen that the common law powers of the attorney general appear, initially at least, broad enough to support the action challenged in this case. But of course, observations concerning the historic office of attorney general or that office as it "typically" exists in the United States cannot resolve the question before us. They can only provide background for inquiry into the specific con-

General has the right to exercise his conscientious official discretion to enter into those legal matters deemed by him to involve the public interest, even though not expressly authorized by statute.

State ex rel. Shevin v. *Yarborough*, 257 So.2d 891, 895 (Fla. 1972) (Ervin, J., concurring) (emphasis added).

[7]*See, e. g., State of Illinois* v. *Bristol-Myers Co.*, 152 U.S.App. D.C. 367, 470 F.2d 1276 (1972); *D'Amico* v. *Board of Medical Examiners*, 11 Cal.3d 1, 112 Cal.Rptr. 786, 520 P.2d 10 (1974); *State ex rel. Patterson* v. *Warren*, 254 Miss. 293, 180 So.2d 293 (1965); *State ex rel. Carmichael* v. *Jones*, 252 Ala. 479, 41 So.2d 280 (1949); 7 Am.Jur.2d § 6, Attorney General; 7 C.J.S. Attorney General § 5. *See generally* Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BaylorL.Rev. 1 (1955).

[8]*See, e. g., D'Amico* v. *Board of Medical Examiners*, 11 Cal.3d 1, 112 Cal.Rptr. 786, 520 P.2d 10 (1974); *Darling Apt. Co.* v. *Springer*, 25 Del. 420, 22 A.2d 397 (1941); *State ex rel. Ervin* v. *Collins*, 85 So.2d 852 (Fla. 1956); 7 Am.Jur.2d § 6, Attorney General; 7 C.J.S. Attorney General § 5.

[9]*See, e.g., Mobil Oil Corp.* v. *Kelley*, 353 F.Supp. 582 (S.D.Ala. 1973), *aff'd*, 493 F.2d 784 (5 Cir. 1973), *cert. denied*, 419 U.S. 1022, 95 S.Ct.498, 42 L.Ed.2d 296 (1974); *In re Intervention of the Attorney General*, 326 Mich. 213, 40 N.W.2d 124 (1949); *Appeal of Margiotti*, 365 Pa. 330, 75 A.2d 465 (1950); *State ex rel. Davis* v. *Love*, 99 Fla. 333, 126 So. 374 (Fla. 1930); 7 Am.Jur.2d § 13, Attorney General; 7 C.J.S. Attorney General § 5.

stitutional and statutory provisions, and judicial decisions, which define the office of Attorney General of Florida. Only that inquiry will allow us to determine whether that office fully fits the common law paradigm or differs in significant respects.

Although the Attorney General of Florida is a constitutional officer, the relevant Florida constitutional provisions have never attempted to list specifically his powers. The first Florida Constitution, written in 1838, provided for an elected Attorney General who would attend sessions of the legislature, draft all necessary "forms of proceeding" for laws passed at the sessions, and "perform such other duties, as may be prescribed by law."[10] In the present constitution, adopted one hundred and thirty years later, no greater specificity was attempted. In defining the cabinet, including the Attorney General who "shall be the chief state legal officer," the 1968 Florida Constitution provides that:[11]

> [i]n addition to the powers and duties specified herein, [the members of the cabinet] shall exercise such powers and perform such duties as may be prescribed by law.

This constitutional provision directs inquiry to the provisions of applicable "law". Does this refer only to statutory provisions defining specific functions of the Attorney General or does it include the broad and unenumerated powers of the office prescribed by the common law?

[10]*Fla.Const.*, art. V (1838).

[11]*Fla.Const.*, art. IV, § 4 (1968).

We find that the common law powers still obtain for several reasons. First, Florida has, since its pre-statehood period, enacted the common law in force where not in conflict with statute.[12] In addition, the statutory provision which does enumerate the Florida Attorney General's powers makes no pretense at being comprehensive; it provides in part that:[13]

> the attorney general shall . . . have and perform all powers and duties incident or usual to such office . . . .

Finally, and most importantly, the Florida Supreme Court has consistently recognized the continuing existence of the Attorney General's common law powers. The first

[12]Fla.Stat.Ann. § 2.01 (1961) (derived from Act, Nov. 6, 1829, § 1). *See generally State ex rel. McKittrick* v. *Missouri Pub. Serv. Comm.*, 175 S.W.2d 857, 861 (Mo. 1943).

[13]Fla.Stat.Ann. § 16.01 (1961) provides in full:

> The attorney general shall reside at the seat of government, and shall keep his office in a room in the capitol; he shall perform the duties prescribed by the constitution of this state, and also perform such other duties appropriate to his office, as may from time to time be required of him by law, or by resolution of the legislature; he shall, on the written requisition of the governor, secretary of state, treasurer, or comptroller, give his official opinion and legal advice in writing on any matter touching their official duties; he shall appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court and district courts of appeal of this state; he shall appear in and attend to such suits or prosecutions in any other of the courts of this state, or in any courts of any other state, or of the United States; he shall have and perform all powers and duties incident or usual to such office, and he shall make and keep in his office a record of all his official acts and proceedings, containing copies of all his official opinions, reports and correspondence, and also keep and preserve in his office all official letters and communications to him, and cause a registry and index thereof to be made and kept, all of which official papers and records shall be subject to the inspection of the governor of the state, and to the disposition of the legislature by act or resolution thereof.

clear decision on the issue was the 1869 case of *State ex rel. Attorney General* v. *Gleason,* in which the Court held:[14]

> The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government. His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people, whenever directed by the proper authority, or when occasion arises. . . . *Our Legislature has not seen fit to make any change in the common law rule.* The office of the Attorney-General is a public trust. It is a legal presumption that he will do his duty, that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have no control.

This affirmation of the existence of the Attorney General's common law powers does not stand alone in Florida jurisprudence. It is echoed in case after case from *Gleason* to the 1972 decision in *State ex rel. Shevin* v. *Yarborough,* 257 So.2d 891 (Fla. 1972).[15] *See State ex rel. Ervin* v. *Collins,* 85 So.2d 852 (Fla. 1956); *State ex rel. Landis* v. *Kress,* 115 Fla. 189, 155 So. 823 (1934); *State ex rel. Davis* v. *Love,* 126 So. 374 (Fla. 1930); *State ex rel. Moodie* v.

[14]12 Fla. 90, 112 (Fla. 1869), *quoted in State ex rel. Davis* v. *Love,* 99 Fla. 333, 126 So. 374 (1930) (emphasis added).

[15]Although there is room in *Yarborough* for a difference of opinion as to the *extent* of the common law powers, the Court clearly recognized their existence: "The Attorney General inherited many powers and duties from the King's Counsellor at Common Law . . . ." 257 So.2d at 893.

Bryan, 50 Fla. 293, 39 So. 929 (1905). We conclude that there simply is no question that such powers exist.

II.

But even this conclusion does not decide the case before us. Although the Florida Attorney General has common law powers, such powers might not extend to the specific power asserted: the institution of an action under federal law, to recover damages sustained by departments, agencies, and political subdivisions which have not affirmatively authorized suit. And even if the specific common law power asserted exists as a general matter, it might be that Florida's constitutional or statutory law conflicts with the common law on that point and thus overrules it.

As noted earlier, Florida statutory law expressly authorizes the Attorney General to "appear in and attend to" actions in which the State is a party. *See* note 13, *supra.* Although it might be argued that this statutory power includes the power to *initiate* suit as well, there is no doubt that the common law power of the Attorney General extends this far. The Florida Supreme Court in *State ex rel. Landis* v. *Kress*[16] defined this power to initiate actions in terms clearly sufficient to cover the case before us:

> The Attorney General has the power and it is his duty among the many devolving upon him by the common law to prosecute all actions necessary for the protection and defense of the property and the revenue of the state . . . .

[16]115 Fla. 189, 155 So. 823, 827 (1934). We must reject any argument by defendants that the right to "prosecute" an action does not include the right to institute the action. That term typically is used to refer, as a unit, to the institution and maintenance to a conclusion of a legal proceeding. *See Black's Law Dictionary* 1385 (4th ed. 1968); *Stewart* v. *Svetley,* 46 Ala.App. 601, 246 So.2d 670, 672 (1971); *People* v. *Zara,* 44 Misc.2d 698, 255 N.Y.S.2d 43, 46-47 (1964); *Thelin* v. *Intermountain Lumber & Builders Supply,* 80 Nev. 285, 392 P.2d 626 (1964); *Sigmon* v. *State,* 200 Va. 258, 105 S.E.2d 171, 178 (1958); *Ex parte Kelly,* 45 Okl. 577, 146 P. 444, 445 (1915); *State ex rel. Stubbs* v. *Dawson,* 86 Kan. 180, 119 P. 360, 364 (1911).

That the Florida Supreme Court in *Kress* did not adopt the restrictive definition contended for by defendants is evidenced by the fact that its description of the quo warranto power also did not specifically mention the right to institute an action; it was power "to determine the right of any one who claims or usurps any office . . . ." Yet the Court said of this power of the Attorney General, that, where cause to institute an action exists, "the power and authority exists in him to present it without leave asked of any one. In that respect he represents the sovereignty whose attorney he is." 155 So. at 827. Similarly, the Court broadly stated that it is the Attorney General's duty "to exercise *all such power and authority* as public interests may require from time to time." *Id.* (emphasis added). Such language seems inconsistent with the very narrow meaning of "prosecute" which defendants argue was intended.

This understanding was reiterated by Justice Ervin, a former Florida Attorney General, who stated that:[17]

> it is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in any litigation or quasijudicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest.

And, contrary to defendants' contention, the Attorney General's power to institute litigation on his own initiative is not limited to quo warranto proceedings in Florida[18]

[17]*State ex rel. Shevin* v. *Yarborough, supra,* 257 So.2d at 894 (Ervin, J., concurring).

[18]For example, in *State ex rel. Davis* v. *Love,* 126 So. 374 (Fla. 1930), the Court upheld the Attorney General's right to file a writ of prohibition against a circuit court judge. And, although not involving original institution of actions in a trial court, *State ex rel. Ervin* v. *Collins, supra,* (appeal); *State ex rel. Shevin* v. *Kerwin,* 279 So.2d 836 (Fla. 1973) (appeal), and *State ex rel. Shevin* v. *Yarborough, supra,* (intervention) present examples of the Attorney General's involvement of the state in other types of litigation on his own initiative.

or elsewhere;[19] it is as broad as the "protection and defense of the property and revenue of the state," and, indeed, the public interest requires.[20]

As to whether such authority is limited to actions under state law,[21] we again start with the Florida Supreme Court's *Kress* decision: "The Attorney General has the power . . . to prosecute *all actions* necessary for the pro-

[19]The black letter in 7 C.J.S. Attorney General § 8a is:

> The attorney general, as the chief legal representative of the state, may institute all legal proceedings necessary to protect the interests of the state . . . .

Accord, 7 Am.Jur.2d § 11, Attorney General. *See, e.g., State ex rel. Carmichael* v. *Jones,* 252 Ala. 479, 41 So.2d 280 (1949); *Morley* v. *Berg,* 216 Ark. 562, 226 S.W.2d 559 (1950); *D'Amico* v. *Board of Medical Examiners,* 11 Cal.3d 1, 112 Cal.Rptr. 786, 520 P.2d 10 (1974); *Gandy* v. *Reserve Life Ins. Co.,* 279 So.2d 648 (Miss. 1973); *Bonniwell* v. *Flanders,* 62 N.W.2d 25 (N.D. 1953); *Agey* v. *American Liberty Pipe Line Co.,* 141 Tex. 379, 172 S.W.2d 972 (1943).

[20]This was made clear in *Kress* by the Florida Supreme Court's inclusion of the quo warranto power of the attorney general in the list of the powers of the office quoted in text:

> The Attorney General has the power . . . by writ of quo warranto to determine the right of any one who claims or usurps any office, and to vacate the charter or annul the existence of a corporation for violation of its charter or for omitting to exercise its corporate powers; to enforce trusts and prevent public nuisances and the abuse of trust powers. As the chief law officer of the state, it is his duty in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interest may require from time to time.

155 So. at 827. The conclusion that *only* quo warranto proceedings are within the attorney general's power to initiate is negated both by the inclusion of that type of proceeding in the list without apparent distinction and by the sweeping power acknowledged in the last sentence of the quoted passage.

[21]We note that the United States District Court for the Southern District of Florida has held that, "under Florida law, the Attorney General has the authority to institute suit to enforce rights created under the laws of Florida in the Federal Court in Diversity suits, but not to enforce rights created under the laws of the United States." *Point East One Condominium Corp.* v. *Point East Developers, Inc.* (No. 73-1815—Civ.-CA, Oct. 17, 1974).

tection and defenses of the property and revenue of the state" (emphasis added). We note also that such a limitation would result in a significant impairment of the state's ability to expeditiously assert important rights under the antitrust laws, bankruptcy laws, and other federal legislation; if authorization must be forthcoming from the legislature or from a myriad of state agencies, it will in some cases come too late to be worthwhile. Moreover, study of applicable Florida statutes reveals no basis for such a restriction. To the contrary the Attorney General is authorized to "appear in and attend to" litigation in state and federal courts alike. § 16.01, Fla.Stat.Ann. (1961). Finally, we note that actions by attorneys general on behalf of states under the federal antitrust laws are by no means a novel phenomenon. *See, e.g., Hawaii* v. *Standard Oil of California,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *In re Multidistrict Motor Vehicle Air Pollution Control Equipment,* 481 F.2d 122 (9 Cir.), *cert. denied sub nom., Morgan* v. *Automobile Mfr's Assn.,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973); *State of Illinois* v. *Bristol-Myers Co.,* 152 U.S.App.D.C. 367, 470 F.2d 1276 (1972); *State of West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079 (2 Cir.), *cert. denied sub nom., Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *State of Illinois* v. *Associated Milk Producers, Inc.,* 351 F.Supp. 436 (N.D.Ill. 1972); *State ex rel. Derryberry* v. *Kerr-McGee Corp.,* 516 P.2d 813 (Okl. 1973). *See also Gardner* v. *State of New Jersey,* 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (attorney general's response to objections in railroad reorganization proceeding under Bankruptcy Act was authorized by state law); *Commonwealth of Kentucky ex rel. Hancock* v. *Ruckels-*

haus 362 F.Supp. 360 (W.D.Ky. 1973) (action by attorney general under Clean Air Act of 1970). For all these reasons, we find no basis for holding that the Attorney General may not act to enforce a state's rights under federal as well as state law.

Finally, it could be argued that, although the common law power of the attorney general to initiate actions under federal law exists, there is no power to initiate an action without affirmative authorization from state instrumentalities where, as here, the action seeks to recover damages allegedly accruing to those instrumentalities.[22] Pertinent to this point are the Florida Supreme Court decisions in *Holland* v. *Watson,* 153 Fla. 178, 14 So.2d 200 (1943), and *Watson* v. *Caldwell,* 158 Fla. 1, 27 So.2d 524 (1946). In those cases, the Court held that the statutorily-created Board of Administration and Trustees of the Internal Improvement Fund were not required to allow the Attorney General to represent them in legal matters, but could employ special counsel of their own choosing.

We find that *Holland* and *Watson* do not cast doubt on the Attorney General's power in this case for several reasons. First, those cases were not ones in which the Attorney General's litigation power was at issue. In both cases, the Florida Supreme Court categorized the Attorney General's duties under three headings:

[22]Such an argument would draw a distinction between actions by the state to vindicate its interests as a unified government entity—for example, proceedings to abate a nuisance or in the nature of quo warranto—and those by the state as a consumer, in which the state may be seen as a collective of the various departments, agencies, and subdivisions which are the actual consumers.

> (1) Such duties as the Constitution and the Legislature lay on him, (2) His duties as legal advisor to the officers of the Executive Department, and (3) His duty as to litigation in which the State is a party or is otherwise interested. 14 So.2d at 202; 27 So.2d at 528.

The Court then treated the question before it as falling under (2)—whether the phrase "officers of the Executive Department" extended to the governmental bodies in question. The scope of the Attorney General's litigation power, under (3) above, was not discussed at all.

Second, the cases in question dealt with a situation in which there was a conflict between the wishes of the Attorney General and the government body as to the body's legal representation. The body had secured legal counsel on its own and the Attorney General sued to enjoin that action. By contrast, there is no evidence in the record before us of any objection on the part of the government bodies which allegedly have been injured by the defendants' business practices. And, as a practical matter, it is difficult to imagine such objections. The individual government instrumentalities involved have something to gain from this suit, and nothing to lose but their causes of action (by way of res judicata or collateral estoppel); and in view of the novelty and difficulty of this suit, it seems most unlikely that those government entities would prefer to prosecute their causes of action individually.

Finally, and most importantly, *Holland* and *Watson* can be read, at the very most, to negate the Attorney General's independent litigation powers only with respect to those governmental entities which are not part of the "Executive

Department" of Florida. Thus, even if this extreme and, we believe, incorrect reading of those decisions were adopted, the Attorney General's powers with respect to the basic Executive Department would remain unquestioned. At this stage of the case, the sole question for decision is whether the Attorney General of Florida is properly in federal court prosecuting this action; it is, in essence, a question of standing. We find that, at least as to the Attorney General's right to represent the state on behalf of the basic Executive Departments, there can be no significant doubt.[23]

For all of these reasons, we believe that the *Holland* and *Watson* cases do not negate the Attorney General's authority to bring the instant action.[24] Neither do we believe that the Attorney General's authority is seriously cast in doubt by the Florida statutes cited by defendants. The fact that various statutes delegate specific portions

[23]Therefore we leave any subsidiary questions as to the representation of the state on behalf of other governmental entities to the stage of this action (and we make no assumption that it will be reached) at which those questions will become relevant: the calculation of damages. In doing so, we are in no way evading an issue properly before us; the question of standing is resolved. And our action is not contrary to the policy against piecemeal litigation. There is a possibility that this litigation, by settlement or otherwise, will not reach the damages stage. And in any event we believe that the computation of damages is likely to be a minor part of the lawsuit as compared to the establishment of a substantive cause of action.

[24]In reaching our conclusion on this point, we see no need for heavy reliance on the decision in *State ex rel. Shevin* v. *Yarborough*, 257 So.2d 891 (Fla. 1972). The Florida Supreme Court stated in its opinion that "[w]e, therefore, conclude that the Attorney General does have status to represent the State as a consumer", apparently without authorization of the subordinate entities who are the direct consumers. But defendants are correct in noting that the Attorney General's status in that regard was not at issue in the case.

of Florida's litigation power to state's attorneys[25] in no way indicates an abrogation of the Attorney General's common law powers as to *other* types of litigation; those powers still obtain in the absence of express legislative provision to the contrary. *See, e.g., State ex rel. Patterson* v. *Warren,* 254 Miss. 293, 180 So.2d 293, 299-300 (1965); 7 Am.Jur.2d § 10, Attorney General; 7 C.J.S. Attorney General § 5. And the Florida Legislature's authorization of suit by the Attorney General under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat.Ann. § 501.201 *et seq.* (1974 Supp.), does not negate his powers with relation to the federal antitrust laws. That statute assigns part of its enforcement power to the state's attorneys, thus necessitating specific delineation of the respective responsibilities of the state's attorneys and Attorney General. The specific authorization therefore had an independent purpose and permits no negative implication as to the federal acts; in any event, the statutory grant of a power possessed by the attorney general at common law normally does not deprive him of other common law powers. *See State ex rel. Carmichael* v. *Jones,* 252 Ala. 479, 41 So.2d 280, 284 (Ala. 1949); 7 C.J.S. Attorney General § 5. Finally, defendants cite the 1969 creation of a Department of Legal Affairs, headed by the Attorney General, to serve as counsel where requested by state governmental bodies, which have independent rights to sue on their own behalf. Fla.Stat.Ann. § 20.11 (1974 Supp.). But that statute merely transfers the Attorney

[25]*E. g.,* Fla.Stat.Ann. § 27.02 (1961) (original criminal proceedings; Fla.Stat.Ann. §§ 17.20, 27.10 (1961) (collection of state claims; Fla.Stat.Ann. §§ 544.03, 544.06 (1961) (criminal and injunctive action against combinations tending to obstruct sale of beef).

General's powers, including all those "prescribed by law," and provides that each board "of which the attorney general is a member" may retain other counsel. Thus, to the extent the statute is at all relevant, it casts no more doubt on the Attorney General's powers than *Holland* and *Watson*. Like those cases, the statute deals with a board's rights to obtain other counsel *if it so chooses* and, like those cases, the statute applies to only a few of the entities upon whom the Attorney General's standing in this case may be based.

III.

Thus we conclude that (1) the Attorney General of Florida retains common law powers, (2) that those powers extend to institution of suits under federal law without specific authorization of the individual government entities who allegedly have sustained the legal injuries asserted, and (3) that neither the decisional nor statutory law of Florida negates such authority.

We reach this conclusion, after extensive study and able briefing by all parties, with considerable confidence. In our view, this simply is not an extremely close question.

But whatever our confidence, only the Florida Supreme Court can decide this state law question in a manner that is, by definition, correct. Thus the defendants' strong urging that the issue be certified to that Court[26] has consid-

[26]Under Florida law, the United States Supreme Court or any United States Court of Appeals may certify questions of state law to the Florida Supreme Court where such questions "are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state." Fla.Stat.Ann. § 25.031 (1961). The question is then briefed to the Florida Supreme Court and oral argument may be allowed. Rule 4.61, Fla.R.App.Proc.

erable force. Both the United States Supreme Court[27] and this Court[28] have lauded the certification process, not only because it produces definitive answers but also because it "helps build a cooperative judicial federalism". *Lehman Bros.* v. *Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974). However, as has been noted by Chief Judge Brown, one of the strongest advocates of the process, certification should never be automatic or unthinking. "We use much judgment, restraint and discretion in certifying. We do not abdicate." *Barnes* v. *Atlantic & P. Life Ins. Co.,* 514 F.2d 704, 705 n. 4 (5 Cir. 1975).

In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law—statutes, judicial decisions, attorney general's opinions—to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided.[29] And we must also take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.[30]

[27]*Lehman Bros.* v. *Schein,* 416 U.S. 386, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974).

[28]*E. g., Coastal Petroleum* v. *Secretary of Army,* 489 F.2d 777 (5 Cir. 1973); *Hopkins* v. *Lockheed Aircraft Corp.* 394 F.2d 656 (5 Cir. 1968).

[29]One aspect of this is the likelihood of the recurrence of the particular legal issue. *See Barnes* v. *Atlantic & P. Life Ins. Co.,* 514 F.2d 704, 706 (5 Cir. 1975).

[30]*See* C. Wright, *Law of Federal Courts* 203-05 (2d ed. 1970).

As we have noted earlier, the narrow issue of the Florida Attorney General's standing to bring this action does not seem to us an extremely close one. And we come to this conclusion with the aid of a long line of Florida decisions—from *Gleason* to *Kress* to *Yarborough*—as well as the body of common law dealing with the powers of attorneys general. This clearly is not a case in which we are required to "guess" state law from one or two questionable precedents.

Defendants urge that the issue before us is one which concerns "the fundamental political structure of the State of Florida" and thus involves a "sensitive area of state law." Although we might respond that the absence of intervention by other state instrumentalities casts doubt upon the degree to which this case involves actual internal state conflict, we recognize that this point has some validity. Comity considerations are more applicable in this case than in one involving, for example, the interpretation of a clause in an insurance contract. However, it is not entirely clear which way the policy in favor of respect for state governmental processes cuts in this case. We have before us the Attorney General, elected by the people of Florida, whose opinions on questions involving the duties of various state officials are persuasive, though certainly not binding, in Florida courts. Fla. Stat.Ann. § 16.01 (1961); *see Beverly* v. *Division of Beverage of Dept. of Bus. Regulation,* 282 So.2d 657 (Fla.D.Ct.App. 1973). He has brought this action in what he has determined to be the public interest and has proceeded for two years without apparent opposition from the Florida Legislature or the state governmental entities he purports to repre-

sent. To impede the progress of this action through the certification process itself seems to us to involve some disregard of the state governmental processes that comity principles require us to respect.

Moreover, we note that, unlike most certification cases, this is not an *Erie* diversity case in which the federal courts merely provide an impartial forum. It is a pure federal question case in which state law happens to be relevant in determining the issue of standing. Additionally, this is not a suit which could ever have been brought in state court, since the federal courts have exclusive jurisdiction over Sherman and Clayton Act cases. 15 U.S.C. §§ 15, 26 (1970). The fact that this is primarily a federal case, and one which has not been "lured" into federal court by means of the diversity jurisdiction, renders considerations of federal-state comity somewhat less persuasive still.

Finally, we must consider an inevitable side effect of certification—delay. The experience in our Circuit has been that the process requires a period approaching one year at the least—sometimes much more. *See, e.g., Allen* v. *Estate of Carman,* 446 F.2d 1276 (5 Cir. 1971), *on receipt of answers to certification,* 486 F.2d 490 (5 Cir. 1973) (28 months); *Hopkins* v. *Lockheed Aircraft Corp.* 358 F.2d 347 (5 Cir. 1966), *on receipt of answers to certification,* 394 F.2d 656 (5 Cir. 1968) (26 months). We consider the prospect of such delay particularly significant in the context of this case. Over two and one-half years already have passed since the filing of this complaint and many preliminary questions are yet to be resolved. The discovery which must take place to establish the alleged

violations, if there be any, can only be massive and extremely time-consuming. As a result, we believe that delay that is not absolutely necessary should be avoided. It is quite possible that the charges against the defendants are wholly ill-founded; but if they deserve to prevail, defendants should do so on the merits rather than through the passage of time.

For all these reasons we decline to certify the state law question in this case to the Florida Supreme Court. In taking this action, we intend to cast no doubt on the general efficacy of the certification process. And we certainly recognize the supremacy of the Florida Supreme Court as interpreter of state law, as well as the possibility, though we believe it to be small, that our decision today is an erroneous one.

Absolute certainty in judicial decisions, as in other areas of human action, is a rare and expensive commodity. In certification cases, unlike most which come before us, it is available to us, since the Florida Supreme Court's word is final. But in this case, with the law on this issue fairly clear, we find the price of certainty too high, in terms of delay which may prejudice the plaintiffs' rights to a speedy resolution of the merits.

Therefore the judgment is reversed.

COLEMAN, Circuit Judge (dissenting):

I respectfully dissent. I would certify this question to the Supreme Court of Florida. Under my concept of federalism, that Tribunal should be the one to delineate

the authority, power, and duties of its Attorney General in those situations where that authority has been drawn into question, especially where, as here, the authority is not express and, at the best, can only be supplied by implication.

Even though a state Attorney General is exercising common law authority as the chief law officer of the realm, he does not exercise that authority as an unlimited monarch, governed only by his own judgment. He necessarily remains, and can act only, as the duly authorized agent (servant) of the State from whence he derives his authority, as formerly from the King.

> "The power and duties of the English attorney general, though frequently referred to as common-law powers and duties, were not in fact such. He was the King's legal adviser and represented him in the courts, and was when the common law came to this country appointed not under any common-law rule but by letters-patent of the King, which set forth what his powers and duties should be, including the courts in which he could appear as the King's representative, and he was at all times subject to the King's supervision and control. 6 Holdsworth's History of the Common Law, 458 et seq. It is true that the common law recognized his right to represent the King in the courts to the extent authorized by his letters patent, but did not confer or broaden this right."[1]

As the majority opinion points out, the 1968 Florida Constitution directs that the Attorney General "shall exercise such powers and perform such duties as may be

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[1]Chief Justice Smith, dissenting in *Kennington-Saenger Theaters v. State*, 196 Miss. 841, 18 So.2d 483, 153 A.L.R. 883 (1944).

prescribed by law" (emphasis mine). There is much room for doubt that by implication the Attorney General has authority "prescribed by law" to bring this particular suit, freighted as it is with much expense and potentially heavy court costs.

In an event, first and last, this is solely a question of Florida law, dealing with one of its officials who purports to act on its behalf. While we have jurisdiction to decide it incidentally to the pending suit, I would give the Florida courts a chance to resolve it in a final, binding manner, especially since we need not invoke the doctrine of abstention but may resort to a specific procedure, frequently invoked in questions of less far reaching consequences.

(Letterhead of
United States Court of Appeals
Fifth Circuit

Office of the Clerk)

March 10, 1976

To All Counsel of Record

No. 74-3309—State of Florida ex rel. Robert L. Shevin, Attorney General v. Exxon Corporation, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk
by /s/ Susan M. Gravios
Deputy Clerk

/smg
cc: all counsel of record

United States Court of Appeals
for the Fifth Circuit
October Term, 1975

No. 74-3309

D. C. Docket No. CA 73-112-T

State of Florida, ex rel. Robert L. Shevin,
Attorney General,
Plaintiff-Appellant,
versus
Exxon Corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before: TUTTLE, THORNBERRY and COLEMAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 22, 1976

COLEMAN, Circuit Judge, dissenting.

Issued as Mandate: Apr. 20, 1976

In the United States District Court
Northern District of Florida
Tallahassee Division

Civil Action No. 73-112-Civ-T

The State of Florida
ex rel Robert L. Shevin,
Attorney General,
Plaintiff,
vs.
Exxon Corporation, a New Jersey
corporation, et al.,
Defendants.

ORDER OF DISMISSAL

This cause came on before me on November 29, 1973 upon all motions then pending and this Court entered its interlocutory order dated November 30, 1973 on the motion of the defendants to dismiss the cause for the lack of the authority of the Attorney General of Florida to institute, on his own initiative and in his own right, a suit in the name of the State of Florida and its entities or on behalf of the agencies, departments and political subdivisions of the State of Florida seeking relief under the antitrust laws of the United States.

The appeal taken by the Attorney General of Florida having been dismissed by the United States Court of Appeals for the Fifth Circuit as not taken from an appealable order and the Attorney General having reported to this Court at the hearing held on July 10, 1974 that he does not intend to seek other appropriate relief as permitted by the order of the United States Court of Appeals for the Fifth Circuit dismissing said appeal and

as suggested by this Court in its order of November 30, 1973, this Court is of the opinion that a final order dismissing this cause should be entered forthwith.

The Court having taken under advisement the motions filed on behalf of the defendants which were argued before the Court at the hearing on November 29, 1973 and the Court having considered the pleadings, briefs and arguments of counsel and there being nothing in the record to show any action by the legislature or even the Cabinet of the State of Florida, or any agency, department or political subdivision of the State of Florida, authorizing the institution of this suit by the Attorney General of Florida in the name of the State of Florida and its subdivisions, the Court is of the opinion and finds that the Attorney General of Florida lacks the authority under the Constitution or laws of Florida to institute, on his own initiative and in his own right, a suit in the name of the State of Florida and its entities or on behalf of the agencies, departments and political subdivisions of the State of Florida seeking relief under the antitrust laws of the United States. It is therefore, upon consideration

Ordered and Adjudged that the motions of the defendants to dismiss this cause for the lack of the authority of the Attorney General to institute this suit as above set forth be and the same are hereby granted and the cause is dismissed, with prejudice.

Done, Ordered and Adjudged at Tallahassee, Florida this 22nd day of July, 1974.

/s/

United States District Judge

In the United States District Court for the
Northern District of Florida
Tallahassee Division

73 12-Civ-T

The State of Florida
ex rel. Robert L. Shevin,
Attorney General,
Plaintiff,

vs.

Exxon Corporation, a New
Jersey corporation, et al.,
Defendants.

ORDER

This cause is before the court for hearing on numerous motions filed on behalf of defendant oil companies including motions to dismiss for lack of the authority in the Attorney General of Florida to bring such an action, motions to dismiss claims brought in the Attorney General's capacity as *parens patriae,* motions to dismiss certain claims brought pursuant to Sections 3 and 7 of the Clayton Act, various motions to strike and for more definite statement, and select motions attacking the jurisdiction of this court as to several of the defendants. All parties were represented by counsel and argument was received by the Court as to all motions in which oral argument was requested.

In this action the Attorney General of Florida seeks to represent, on the instance of the authority in that office, (1) the State of Florida, its agencies, departments, and political subdivisions, (2) the State of Florida in its capacity as *parens patriae* trustee, guardian and repre-

sentative of the people of the State of Florida, and (3) the State of Florida as representative of a class of all public entities of the State including counties, municipalities, school boards, special taxing districts, and their several departments, agencies, and divisions, as consumers of the goods and services alleged to be the subject of the defendants' anti-competitive activities.

The claim generally is that these defendants, the major oil companies of the United States, have collectively conspired to violate the antitrust laws of the United States resulting in injury to the State of Florida and to its peoples as consumers of defendants' goods and services.

In this litigation a threshold issue has been raised which this Court thinks ought to be resolved at the outset. The question is the authority of the Attorney General of Florida to bring this action in the various capacities alleged. Since the magnitude of this action is so great and the pre-trial discovery and preparation could reasonably extend over a significant period of time, this Court thinks it would be disastrous not only to the parties but to the Court in view of the allocation of the judicial time and facilities, to conclude this litigation with this very serious question unresolved.

The Attorney General argues that this authority to represent all the parties plaintiff in this action is unquestioned under Florida law. This Court finds the contrary to be true and would observe here that throughout the history of Florida, as is indicated by court decisions and the various constitutions adopted by Florida, that there is great doubt as to the outer perimeter of the authority of the Attorney General who is a member of the state cabinet. The present constitution of Florida,

the statutory laws and decisions of the highest court of this state offer little assistance to this Court in determining the authority of the Office of the Attorney General of Florida to institute suits against persons allegedly violating the laws of the United States.

The present Constitution of the State of Florida, adopted in 1968, contains the following provisions relating to power of the Attorney General:

Article IV, Section 4:

"(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. *In addition to the powers duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.*

(c) *The attorney general shall be the chief state legal officer.*" (emphasis supplied)

There is no provision in the Florida Constitution which generally empowers the Attorney General to institute suit in the name of the state or specifically empowers him to institute suit to seek relief for violations of federal law. Rather the Constitution of Florida in Article II, Section 3, raises doubt as to the authority of the Attorney General to represent, as he purports to do in this suit, all divisions and departments in the three separate branches of government in any action without explicit authority to do so.

Article II, Section 3:

"The powers of the state government shall be divided into legislative, executive, and judicial branches. *No person belonging to one branch shall exercise any*

powers appertaining to either of the other branches unless expressly provided herein."

Likewise the decisions of the Florida Supreme Court suggest the problem involved in this multicapacity representation sought by the Attorney General. In *Holland v. Watson,* 14 So.2d 200 (Fla. 1943) the Attorney General filed a bill of complaint in the circuit court seeking to restrain the State Board of Administration from retaining counsel other than the Attorney General. He alleged that under the common law, the statutes, and the Constitution of Florida, it was the exclusive prerogative of the Attorney General to represent the Board. The Florida Supreme Court disagreed with the Attorney General and did so having before it for consideration its own decision in *State ex rel Landis v. Kress,* 115 So. 823, (1934), wherein it defined the common law duties of the Attorney General. The *Holland* court, finding no intent on the part of the legislature to extend the duties of the Attorney General to that of representing the Board, decided that the State Board of Administration could employ other counsel to represent it. The Florida Court addressed the same question in *Watson v. Caldwell,* 27 So.2d 524 (Fla. 1946) and reached essentially the same conclusion.

Recently in *Shevin v. Yarborough,* 257 So.2d 891 (Fla. 1972), the Supreme Court of Florida was faced with the question of the authority of the Attorney General to intervene in civil matters "on behalf of all citizens of the State of Florida who are consumers. . ." The Public Service Commission had allowed the Attorney General to proceed on behalf of the State of Florida as a consumer but had disallowed his representation of "the people of Florida." The Supreme Court holding in the

Yarborough case was essentially that a decision as to the Attorney General's right to represent the citizens of Florida was unnecessary since whatever relief was secured for the State as a consumer would also benefit the citizens without the necessity for further action. The Attorney General in the instant case argues that *Yarborough* is precedent for his representation in this suit not only of the State as a consumer but of the citizenry of Florida as consumers. It cannot be. The *Yarborough* Court expressly did not decide whether the Attorney General could represent the people of Florida. And as to the question of the Attorney General's representation of the State of Florida as a consumer, the Florida Court made the following critical notation:

> "Respondent P.S.C. has recognized the intervention before it of the Attorney General on behalf of the State of Florida as a consumer *and this right is in no wise* questioned." *Yarborough,* supra, p. 892. (emphasis supplied)

It is obvious to this Court then that the all-important question which is before this Court has not been directly put to the Florida courts. This is particularly significant since the instant case represents, in its magnitude, a substantial departure from even those common law powers normally conceded to the Attorney General. At the very least the character of this suit amplifies the language of the Florida Supreme Court in *Yarborough* wherein it stated that:

> "[P]ublic policy on the outer perimeter of his authority (the authority of the Attorney General) is therefore more a Legislative than Judicial question. We take judicial notice that the Legislature of Flor-

ida convenes in a few days and we defer to that august body the broader question of the outer limits of such authority." *Yarborough,* supra, p. 894.

It is the opinion of this Court that the concession by the Public Service Commission does not establish the law of the state regarding the authority of the Attorney General to institute this suit and that this determination should be made by the courts of Florida and not by a federal trial court. This Court feels that it is essential to the growth and preservation of the state-federal relationship that federal courts not decide initially serious questions of state law especially when there is a streamlined procedure under state law for determining questions such as the power of the Attorney General to bring the instant suit. This Court has in mind the right of the Attorney General to file suit in circuit court for a declaratory decree which decision is then directly reviewable by the Florida Supreme Court. It is common knowledge that under the practice of the Florida courts certain matters may be expedited in such manner as to receive a speedy determination or resolution of the issues.

This Court recognizes that the Attorney General of Florida is the chief legal officer of the state. But the Court is also mindful of the fact that disputes other than those discussed in the Florida Supreme Court decisions referred to above have arisen between the Attorney General and various other cabinet officers as to whether the Attorney General has the right to represent them as counsel. The argument advanced is that in many instances in matters before the state cabinet the position of the Attorney General is or may be antagonistic to positions of the other cabinet officers. The authority of

the Attorney General is thus critical in this suit in view of the possible antagonistic positions and interests of the many parties plaintiff whose rights are sought to be litigated here.

It is the opinion of this Court that the matter should be stayed until the state courts of Florida have determined the authority of the Attorney General of Florida to bring this action in the capacities described in paragraph 5-7 of the amended complaint filed herein. It is unfortunate that this Court under existing law is not allowed to certify this question directly to the Supreme Court of the State of Florida for its determination of this matter.

It is therefore

ORDERED:

(1) This cause is stayed for a period of thirty (30) days so that the Attorney General may pursue a decision in the state court with respect to his authority set forth in the next preceding paragraph.

(2) Not later than thirty (30) days from this date the Attorney General shall advise this Court of steps taken to secure a decision of the state courts in the matters set forth above.

(3) At the end of the thirty (30) days period further hearing shall be held for the taking of such actions as this Court deems necessary and proper.

Done and Ordered in chambers at Tallahassee, Florida, this 30th day of November, 1973.

/s/ David L. Middlebrooks
David L. Middlebrooks
United States District Judge

STATUTES AND CONSTITUTIONAL PROVISIONS

Section 25.031, Florida Statutes, provides:

Supreme court authorized to receive and answer certificates as to state law from federal appellate courts

The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

Article IV ("Executive") of the Florida Constitution provides:

SECTION 1. Governor.—

(a) The supreme executive power shall be vested in a governor. He shall be commander-in-chief of all military forces of the state not in active service of the United States. He shall take care that the laws be faithfully executed, commission all officers of the state and counties, and transact all necessary business with the officers of government. He may require information in writing from all executive or administrative state, county or municipal officers upon any subject relating to the duties of their respective offices.

• • • • •

SECTION 2. Lieutenant governor.—

There shall be a lieutenant governor. He shall perform such duties pertaining to the office of governor as shall be assigned to him by the governor, except when otherwise provided by law, and such other duties as may be prescribed by law.

• • • • •

SECTION 4. Cabinet.—

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller, countersigned by the governor. The governor shall countersign as a ministerial duty subject to original mandamus.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

* * * * *

SECTION 6. Executive departments.—All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:

(a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

(b) Boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1778

STANDARD OIL COMPANY OF CALIFORNIA;
AMERADA HESS CORPORATION;
GULF OIL CORPORATION;
MARATHON OIL COMPANY;
PHILLIPS PETROLEUM COMPANY;
and STANDARD OIL COMPANY (OHIO),

Petitioners,

-v-

STATE OF FLORIDA EX REL. SHEVIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT L. SHEVIN
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
CHIEF TRIAL COUNSEL

CHARLES R. RANSON
ASSISTANT ATTORNEY GENERAL

725 South Calhoun Street
Bloxham Building
Tallahassee, Florida 32304
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

(Certificate of Service follows Appendix)

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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STANDARD OIL COMPANY OF CALIFORNIA;
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-v-

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Petition for Certiorari accurately reflects those opinions and orders referred to therein. In addition, a copy of the Order of the Honorable Lewis J. Powell, Jr., denying the Application for Stay of Mandate, which was not included in Petitioners' appendix, is appended hereto. (App., p. A-1)

RESTATEMENT OF QUESTION PRESENTED

After an exhaustive review of the federal question of the standing of the Florida Attorney General to institute an antitrust action pursuant to federal law in federal court on behalf of the departments, agencies and political subdivisions of the State, the Court of Appeals determined that the existence of such authority was "simply not an extremely close question" State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 at 274 (5th Cir., 1976) and, in deciding that the Attorney General clearly did have such standing, also determined that certification of the issue to the Florida Supreme Court was unnecessary and improvident.

The issue raised is whether the Court of Appeals abused its discretion regarding the use of the certification process in determining that certification to the Florida Supreme Court was unnecessary in the light of the unambiguous state decisions, the significant delay which would result from certification and the determination that there was no apparent conflict between or within the branches of Florida government.

STATEMENT OF THE CASE

In July of 1973, the Florida Attorney General instituted an antitrust action in the federal district court for the Northern District of Florida. The jurisdiction in the action was founded solely on 15 U.S.C., §§15, 26 (1970), the federal antitrust laws, and the diversity jurisdiction of

the federal courts was not invoked. The suit was against seventeen major oil companies alleging a scheme of anticompetitive activities in the production, transportation, refining, and marketing of petroleum; seeking, inter alia, to recover damages allegedly suffered by the State of Florida as a consumer, which damages accrued to the constituent units of the State--its agencies, departments and subdivisions.

Among the preliminary issues raised by the defendants in that suit was the right of the Florida Attorney General to institute an antitrust action in the federal court pursuant to a federal law without explicit authority from those departments, agencies and political subdivisions.

After the federal district court dismissed the action for lack of such authority, the Attorney General appealed to the Fifth Circuit Court of Appeals and that Court, after exhaustive analysis, upheld the Attorney General's right to institute the action in federal court pursuant to a federal statute. State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir., 1976) In the Court of Appeals, the Petitioners here argued unsuccessfully that the issue was a delicate and difficult one of state law which should be certified to the Florida Supreme Court for its definitive decision. However, in determining that the Attorney General has the power to prosecute the action, Judge Thornberry noted (Id. at p. 272) that "actions by attorneys general on behalf of states under the federal antitrust laws are by no means a novel phenomenon . . . ."

and that the question posed by that litigation "is a pure federal question . . . in which state law happens to be relevant in determining the issue of standing." (Id. at p. 275) The ultimate consideration relates to the vindication of a right created by federal statute to protect United States citizens (who, in the context of this case, are coincidentally citizens of the State of Florida) by the elected public official best able to protect that federal right.

The Court of Appeals, in holding that the Attorney General clearly had standing to bring the federal court action without an express grant of authority and, in denying the request for certification, concluded:

> We reach this conclusion, after extensive study and able briefing by all parties, with considerable confidence. In our view, this simply is not an extremely close question. State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 at 274 (5th Cir., 1976)

The Court of Appeals further closely examined the comity issue raised by the oil companies that that case involved "the fundamental structure of the state of Florida" and that it is a "sensitive area of state law." The Court noted the lack of objection or intervention by other state instrumentalities in the period of over two years since the institution of the suit and the primarily federal nature of the question, i.e., the standing to institute

suit in a federal court pursuant to a federal statute, and decided that the consideration of federal-state comity was "somewhat less persuasive still." (Id. at p. 275)[1] Finally, the Court of Appeals considered the further delay of the action as weighed against the necessity of a State Court statement on that already relatively clear issue before the Court in deciding against certification. (Id. at p. 275)

There followed a series of unsuccessful attempts to have that decision reconsidered, modified, or overturned by the courts. The matter, having been unsuccessfully argued on the merits before the Fifth Circuit Court

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[1]Subsequent events in Florida provide an even greater reason as to why it would unnecessarily violate the principles of comity for the court to grant certiorari. The legislature passed CS/SB 738 that expressly authorized the Attorney General to bring suit under the federal antitrust laws. (App., pp. A-2 - A-7)

The antitrust authorization was included in a bill that dealt with other civil litigation. The Governor vetoed the bill on entirely independent grounds. See veto message filed June 24, 1976, for CS/SB 738, and supporting memorandum, which states "the veto of CS/SB 738 is not directed at §3 relating to antitrust litigation. Chapters 542 and 16, F.S., Art. IV, §4, Fla. Const. (1968) and the common law brought forward by Ch. 2, F.S., presently provide the same authority." (App., p. A-9 - A-12) Clearly, the Court should not interfere with the Attorney General's power in the face of the positive approval of both the legislative and executive branches of the state government.

of Appeals, was then unsuccessfully petitioned for rehearing en banc by the entire federal circuit appellate court, which petition was summarily denied. There was then an unsuccessful attempt to have the Court of Appeals stay its Mandate pending filing of a Writ of Certiorari with this Court, which attempt was also summarily denied. Further, a petition for a stay pending the filing of a Writ of Certiorari was also sought from this Court directly, which petition was likewise denied. Finally, an effort was made to have the Fifth Circuit Court of Appeals modify its Mandate to permit the unsuccessful appellees to seek a stay of the proceedings in the federal district court, to which the matter returned, in order to file a declaratory judgment action relating to the same issues in the Florida courts. This effort was likewise summarily denied. Nevertheless, such an action for a declaratory judgment was then instituted in the Florida Court and is presently pending on a Motion to Dismiss filed by the Attorney General.[2] Finally, this Petition for a Writ of Certiorari was submitted to this Court.

ARGUMENT

THE CRITERIA FOR USE OF THE CERTIFICATION PROCEDURE HAVING BEEN SET OUT BY THIS COURT AND HAVING BEEN PROPERLY APPLIED BY THE COURT OF APPEALS IN THIS CASE, THERE IS NO ISSUE WHICH MEETS THE STANDARDS FOR THE GRANTING OF A WRIT OF CERTIORARI.

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[2]Mobil Oil Corp., et al. v. Robert L. Shevin, Attorney General, Second Judicial Circuit, No. 76-950.

The basic legal theory put forth by the Petitioners in seeking certiorari is that the proper standards for use of the certification procedure have not been sufficiently defined by the leading cases on this subject.[3]

In seeking certiorari, the Petitioners have the burden of establishing special and important reasons which would justify the Court's granting certiorari. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)

The Court "does not sit to satisfy a scholarly interest in [an] issue. Nor does it sit for the benefit of particular parties." Rice v. Sioux City Memorial Park Cemetery, supra, at p. 74. The test therefore is not the importance of the issue to the particular litigation, but rather the importance of the decision to the development of the legal system. Thus, in Layne and Bowler Corp. v.

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[3]The sole apparent basis which Petitioners seek to apply to their Petition for Certiorari appears to be that set out in Rule 19(1)(b) (Rules of Supreme Court), which indicates that among the reasons for determining to grant certiorari, the following will be considered:

"(b) Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court; . . . . ."

No other criteria of Rule 19 appears to apply to the reasons for granting the Writ set out by Petitioners (Petition for Certiorari, p. 5)

Western Well Works, Inc., 261 U.S. 387 (1922), this Court dismissed a Writ of Certiorari as improvidently granted after deciding that there was no conflict between the circuits. Justice Taft rejected the contention that since arguments had been heard the Court should decide the case:

> It is manifest from the review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th, and 20th claims, that they were really in harmony, and not in conflict, and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head. 261 U.S. 387, 392-393 (e.s.)

The Petitioners must therefore show some genuine conflict among the circuit courts[4] or some principle which needs to be decided of importance beyond the litigation at hand.

However, a careful reading of the Petition for Certiorari makes it clear that the real argument of Petitioners is that the size and scope of the suit at hand justifies the granting of certiorari.[5]

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[4]Petitioners do not suggest in their Reasons for Granting the Writ that a conflict exists between the circuits in the setting of criteria for use of certification, though there appears to be some suggestion in the arguments that a difference of approach to application of the criteria exists. (Petition for Certiorari, p. 8, fn. 4) Any claim of inconsistency of criteria for determining the use of the certification process is without merit. (See discussion, infra pp. 14-17).

[5]"This is no routine tort or contract action. It is a massive Federal antitrust action that will consume millions of dollars and as much as a decade of the time of the congested Federal courts and of the parties." (Petition for Certiorari, p. 9) And at another point, Petitioners assert that the Court of Appeals "erroneously failed to recognize the immense savings in judicial resources that certification could achieve in this case, with only minor inconcenience to the parties." (Petition for Certiorari, p. 7) It might be noted that there are numerous other suits, including suits by Kansas, Connecticut, California and the City of Long Beach on basically

This, however, is not a proper consideration for the granting of certiorari.[6]

The Petitioners frame the first reason for granting certiorari as follows: "This Court should provide additional guidance for the proper use of the rapidly emerging certification procedure." (Petition for Certiorari, p. 5) The three additional "reasons" for granting certiorari, set out in Points II, III and IV of the Petition for Certiorari, are merely sub-issues of the first: the need to clarify the weight to be given possible delay (Petition for Certiorari, p. 8), the need to clarify the degree of uncertainty of the state law that would justify certification (Petition for Certiorari, p. 12), and finally the need to clarify when issues of important state policy require certification. (Petition for Certiorari, p. 15) Actually the last three reasons when carefully examined merely recognize the present criteria and assert that the Fifth Circuit incorrectly applied those existent standards for certification, i.e., delay, difficulty

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the same issues, and that they will proceed on basically the same massive issues of fact and law as this action, even if this case were ultimately dismissed for lack of standing.

[6]It must be emphasized that the Court does not sit for particular litigants, regardless of how important those litigants may feel their particular litigation to be. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

of ascertaining state law, on comity considerations, rather than asserting that the standards that were used were incorrect.

In point of fact, the standards set out for the use of the certification procedure are quite well-defined, as are in the limitations on the scope of judicial review of the application of those standards to a particular case.

An examination of the standards that the Fifth Circuit adopted in State of Florida ex rel. Shevin v. Exxon Corp., supra, indicates that the Court in fact considered three factors as controlling: (1) the closeness of the question and the existence of sufficient sources of state law; (2) principles of comity required by the nature of the issues; and (3) practical considerations such as the degree of delay that certification would cause:

> In determining whether to exercise our discretion in favor of certifications, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law--statutes, judicial decisions, attorney general's opinions--to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification

process; significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court. 526 F.2d 266 at 274-275.[7]

It must be remembered that two distinct issues are involved. The first is whether or not the Fifth Circuit used the proper standards. The second is whether or not these standards were correctly applied. The Petitioners address the issue of standards in their first reason why certiorari should be granted. Although couched in the language of clarifying standards, the Petitioners in Points II, III, and IV, as noted above, merely assert that the standards were misapplied in this particular case. If this is the proper characterization of the Petitioners' last three arguments, then they are not relevant in establishing an important public need to clarify standards. Instead they merely go to the questions of whether or not their particular case was wrongly decided. It is axiomatic that certiorari is not granted merely because of the interest of the particular litigants. See Rice v. Sioux City Memorial Park Cemetery, supra.

The standards for use of the certification procedure are well-established and, as set out above, were carefully examined and weighed by the Court in this case.

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[7]Also see 526 F.2d 266 where the Court recognized the likelihood of recurrence of a particular issue as a factor to be considered.

The considerations applied by the Fifth Circuit and set out above are the same considerations enunciated by this Court in discussing certification. In Kaiser Shell Corp. v. W. S. Ranch Co., 391 U.S. 593 (1969), this Court asserted:

> The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource. 391 U.S. 593, 594 (1969)

The court in Kaiser uses a multitude of factors including comity, uncertainty of the state law (novelty), possibility of delay, and probability that the issue will reoccur. The Fifth Circuit used the exact same criteria. See Exxon, supra, at 274, 275 and 266. Kaiser supports the respondents contention that a consistent

standard has been used on the certification issue.[8]

Likewise, the criteria considered are consistent, both in certification and abstention cases, except for the factor of some possible greater facility in obtaining a state court review by the certification process.[9]

In reviewing the certification--abstention question, Petitioners' assertion that a comparison of Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959) with Louisiana P and L Co. v. City of Thibodaux, 360 U.S. 25 (1959) will demonstrate a "vacillating and often conflicting line of decisions," will not withstand analysis. In Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959), 79 S.Ct. 1070, 3 L.Ed.2d 1058, the Supreme Court affirmed the judgment of the Court of Appeals holding that the district court improperly invoked the doctrine of abstention. The Plaintiffs in Allegheny County were property owners in Pennsylvania who challenged the appropriation of their

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[8]Kaiser clearly does not stand for the proposition that the considerations of comity by themselves require that an issue be certified as is argued mistakenly by Petitioners.

[9]It should be made clear, however, that the certification process is by no means "fast", and that it involves significant delay in the judicial process as compared to a decision by the federal court without certification. As the Fifth Circuit pointed out, the experience with

property as an illegal taking for private use. The district court recognized that it had diversity jurisdiction, but invoked the doctrine of abstention. The Supreme Court upheld the Court of Appeals reversal. The Court reasoned that it was "perfectly clear under Pennsylvania law that the respondents would have challenged the validity of the taking, on the ground that it was not for a public purpose. (360 U.S. 185 at 190) The court concluded that "the state law that the district court was asked to apply is clear and certain." (360 U.S. 185 at 190) Since only a factual determination was required, there would be no problem with the possibility of the federal court misapplying state law. The court also stated that merely because the case dealt with the state's eminent domain power, there was no basis to conclude that abstention is justified on the grounds of avoiding the hazard of friction in federal-state relations. Finally, the court emphasized that abstention would accomplish "additional delay and expense." These standards that were the basis of the court's decision in Allegheny County are precisely the standards adopted by the Fifth Circuit in Exxon, supra. This

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the certification process in the Fifth Circuit indicates an average delay exceeding one year--and sometimes much more. See e.g., Allen v. Estate of Carmen, 446 F.2d 1276 (5th Cir., 1971), on receipt of answers to certification, 486 F.2d 490 (5th Cir., 1973) (28 months); Hopkins v. Lockheed Aircraft Corp., 358 F.2d 347 (5th Cir., 1966), on receipt of answers to certification, 394 F.2d 656 (5th Cir., 1968) (26 months).

suggests that the standards have in fact been consistently applied.

Petitioners' assertion that Louisiana P & L Co. v. City of Thibodaux, supra, is inconsistent with Allegheny County will not withstand analysis. In Louisiana P & L Co., the district court was confronted with an extremely close question of Louisiana law. Louisiana P & L Co. merely stands for the proposition that a district court judge does not abuse his discretion "to solve his conscientious perplexity by directing utilization of legal resources of Louisiana" (360 U.S. 25 at 30) The concurring opinion of Justice Stewart is even more explicit. Justice Stewart stated that "this case is totally unlike Allegheny County v. Frank Mashuda Co., decided today except for the coincidence that both cases involved eminent domain proceedings." (360 U.S. 25 at 31) Justice Stewart went on the emphasize the fact that the controlling law was clear in Allegheny County and all that the district court was required to do in that case was to decide a factual controversy.

The Petitioners erroneously assert that the need for clarification of the standards for certification "is illustrated by the sharp decisions in such cases as United States v. Buras (5th Cir., 1972), 475 F.2d 1370, 1371, cert. denied (1973), and Schein v. Chasen, (2nd Cir., 1973), 478 F.2d 817, 819, 825, vacated 1974, 416 U.S. 386" (Petition for Certiorari, p. 7) At the first it should be noted that the Petitioners do not assert a conflict between the circuits but rather a conflict within the panel of judges making the decisions in those cases.

In Buras there is only a per curiam denial for rehearing with no discussion. Judge Brown dissented on the grounds that the Louisiana certification statute should have been used. Similarly, the dissent in Schein urged that the Florida certification statute be utilized. Yet there is nothing to indicate in either case that the Allegheny County standard was not adhered to. In all likelihood there was simply a disagreement on the application of that standard to the particular factual situation. To conclude from the fact that certain judges dissent in the application of a rule is sufficiently adequate grounds to grant certiorari is patently absurd.

It is clear, therefore, that there is little evidence of a conflict in the standards that are used in deciding whether to certify a question. The Fifth Circuit in State of Florida ex rel. Shevin v. Exxon Corp., supra, rigorously applied the same standards that were enunciated in Kaiser and Allegheny County.

Finally, in reviewing this matter the caution expressed by this Court in evidencing the discretionary activity of the Circuit Court in their use or non-use of the certification process should be kept in mind. The Court has clearly recognized that any rule which lacked flexibility and adequate discretion in the lower court should be avoided. In Lehman Brothers v. Schein, 416 U.S. 386 at 390-391 (1974), this Court asserted that "we do not suggest where there is doubt as to local law and where the certification procedure is available, resort to it is

obligatory."[10] Furthermore, Justice Rehnquist, in his concurring opinion, reviewed the discretionary nature of the procedure:

> While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court. See Clay v. Sun Insurance Office, 363 U.S. 207, 226-227, 4 L.Ed.2d 1170, 80 S.Ct. 1222 (1960) (dissenting opinion). The Supreme Court of Florida has promulgated an appellate rule, Fla. Appellate Rule 4.61 (1967), which provides that upon certification by a federal court to that court, the parties shall file briefs there according to a specified briefing schedule, that oral argument may be granted upon application, and that the parties shall pay the costs of the certification. Thus while the certification procedure is more likely to produce the correct determination of state law, additional time and money are required to achieve such a determination.
>
> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. 416 U.S. 386, 394-395 (1974)

[10] While Lehman Brothers is a diversity case, the Fifth Circuit correctly indicated that the basis for certification is even less in this case, where the issue involves standing to sue in federal court pursuant to a federal statute and the local law is only incidental to the determination of the purely federal question. See 526 F.2d at 275 (5th Cir., 1976)

In summary, Petitioners' attempts to frame their reasons for granting certiorari on the basis of the need to clarify the standards for certification are unconvincing. It appears that the procedure itself is only rarely used and when it has been used, consistent standards have been applied. When the Petitioners' arguments are closely examined, they are no more than an assertion that the question in the lower court was close enough to require certification because of the size of that particular lawsuit. In short, Petitioners argue that the existing standards were misapplied by the Fifth Circuit. Such an argument is clearly not a sufficient basis for the granting of certiorari.

CONCLUSION

For the reasons stated, the Petition

for a Writ of Certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

(APPENDIX FOLLOWS)

A P P E N D I X

April 19, 1976

Noble McCartney, Esq.
Suite 1100
1660 L St., N.W.
Washington, D.C. 20036

Re: Standard Oil Company of California v. Florida ex rel. Robert L. Shevin
A-862 [USCA 5 #74-3309]

Dear Sir:

The Court today entered the following order in the above-entitled case:

The application for a stay of the mandate of The United States Court of Appeals for the Fifth Circuit (No. 74-3309) pending the timely filing and disposition of a petition for writ of certiorari, presented to Mr. Justice Powell and by him referred to the Court, is denied.

Very truly yours,

Michael Rodak, Jr., Clerk

s/ Helen Taylor

Helen Taylor (Mrs.)
Assistant Clerk

Hon. Robert L. Shevin
Attorney General of Florida
Capitol
Tallahassee, Fla. 32304

Att'n Sydney H. McKenzie, III
Chief Trial Counsel

A bill to be entitled

An act relating to legal services for state agencies; amending s. 16.01, Florida Statutes; creating s. 16.055, Florida Statutes; specifying persons to whom the Attorney General may give official opinions; creating s. 16.55, Florida Statutes; authorizing the Attorney General to initiate, maintain, prosecute lawsuits to enforce antitrust laws; creating s. 16.57, Florida Statutes; authorizing the Attorney General to initiate civil litigation, with the approval of the Governor and Cabinet, when no state agency is vested with the authority to enforce such right; providing exceptions and authorizing the Attorney General to file under certain statutes; providing procedure for Attorney General to initiate civil litigation when a state agency is vested with authority; amending s. 20.11, Florida Statutes; providing that the Department of Legal Affairs may provide legal services to a state agency only upon written request of the head of such agency; creating s. 542.13, Florida Statutes; providing a trust fund for the purpose of funding investigation, prosecution, and enforcement of the provisions of state or federal antitrust laws; providing for the allocation of recovered funds; repealing s. 16.101, Florida Statutes, which

provides that the Attorney General shall be the reporter for the Supreme Court; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 16.01, Florida Statutes, is amended to read:

16.01 Residence, office and duties of attorney general.--The Attorney General shall reside at the seat of government, and shall keep his office in a room in the capitol; he shall perform the duties prescribed by the constitution of this state, and also perform such other duties appropriate to his office, as may from time to time be required of him by law, or by resolution of the legislature; ~~he shall, on the written requisition of the Governor, Secretary of State, Treasurer, or Comptroller, give his official opinion and legal advice in writing on any matter touching their official duties;~~ he shall appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court and district courts of appeal of this state; he shall appear in and attend to such suits or prosecutions in any other of the courts of this state, or in any courts of any other state, or of the United States; he shall have and perform all powers and duties incident or usual to such office, and he shall make and keep in his office a record of all his official acts and proceedings, containing copies of all his official opinions, reports and correspondence, and also keep and preserve in his office all official letters and communications to him, and

cause a registry and index thereof to be made and kept, all of which official papers and records shall be subject to the inspection of the Governor of the state, and to the disposition of the Legislature by act or resolution thereof.

Section 2. Section 16.055, Florida Statutes, is created to read:

16.055 Opinions of the Attorney General.--

(1) The Attorney General shall, upon the written request of the Governor, Lieutenant Governor, Secretary of State, Treasurer, Comptroller, Commissioner of Agriculture, Commissioner of Education, any member of the Florida delegation to the United States Congress, any member of the Florida Senate or the Florida House of Representatives, a State Attorney, a sheriff, or any other constitutional county officer, the Auditor General, or the head of any state department, render his official opinion in writing on any matter affecting the official responsibility, authority, powers, or duties of such officer. On matters of statewide interest affecting the respective responsibility, authority, powers, or duties of any of the following persons, the Attorney General shall, upon written request, render his official opinion to a Clerk of Circuit Court, a property appraiser, or a police chief. Official opinions shall be given only to those persons specified in this subsection.

(2) All requests for official opinions of the Attorney General shall be in writing and shall:

(a) Set forth all relevant facts regarding the matter about which inquiry is made;

(b) Contain a statement as to the manner in which the matter inquired about affects the requesting party;

(c) Contain a citation to, or be accompanied by copies of any known relevant applicable legal authorities;

(d) Contain a statement showing that the matter inquired about touches upon the powers and duties of the person making the inquiry; and

(e) Contain a memorandum of law stating the position of the legal counsel representing the requesting party if such person is represented by legal counsel.

(3) Any interested parties may file with the Attorney General a memorandum of law regarding a request for an Attorney General's opinion.

Section 3. Section 16.55, Florida Statutes, is created to read:

16.55 Antitrust litigation.--The Attorney General is authorized to initiate, maintain, or prosecute lawsuits in the courts of this state, any other state, or in the federal courts to enforce the antitrust laws of the State of Florida and of the United States on behalf of the State of Florida or any unit of government in this state.

Section 4. Section 16.57, Florida Statutes, is created to read:

16.57 Authority of the Attorney General to initiate civil litigation.--When any statutory, common law, or constitutional provision provides a public right which may be enforced by the filing of a civil lawsuit and no state agency has been vested with the authority to enforce such right, the Attorney General, with the approval of the Governor and Cabinet, is authorized to commence, prosecute, and settle appropriate civil litigation, on behalf of the State of Florida or on behalf of the people of this state, to enforce such statutory, common law, or constitutional provisions;

provided that the approval shall not be necessary for the Attorney General to enforce any provision contained in chapters 16, 60, 80, 83, 86, 501, and 542, to the extent provided therein, or when the Attorney General is otherwise specifically authorized by law. If a state agency is vested with civil litigation enforcement authority, the Attorney General shall obtain the written concurrence of the agency vested with such enforcement authority prior to commencing any civil litigation. When an agency having enforcement authority refuses to approve the commencement of civil litigation by the Attorney General, the Attorney General shall obtain the approval of the Governor and Cabinet prior to commencing such civil litigation.

Section 5. Subsection (3) of section 20.11, Florida Statutes, is amended to read:

20.11 Department of Legal Affairs.--There is created a Department of Legal Affairs.

(3) The Department of Legal Affairs shall provide ~~be responsible for providing all~~ legal services to an agency of state government only upon written request of the head of the agency ~~required by any department unless otherwise provided by law~~, provided however, the Attorney General may authorize other counsel where emergency circumstances exist and shall authorize other counsel when professional conflict of interest is present. Each board, however designated, of which the Attorney General is a member may retain legal services in lieu of those provided by the Attorney General and the Department of Legal Affairs.

Section 6. Section 542.13, Florida Statutes, is created to read:

542.13 Antitrust Revolving Trust Fund.--

(1) There is hereby created in the State Treasury a trust fund named the Antitrust Revolving Trust Fund from which the Legislature may appropriate funds for the purpose of funding investigation, prosecution, and enforcement of the provisions of state or federal antitrust laws by the Attorney General.

(2) Six percent of all money recovered by the Attorney General in any civil action for violation of federal or state antitrust laws on behalf of the state or its agencies shall be deposited in the fund. In the case of recoveries made on behalf of any unit of government in this state, 10 percent of the recovery, or attorney's fees and actual expenses incurred by the Attorney General, whichever is greater, shall be deposited in the fund. The remainder of the money recovered shall be deposited in the General Revenue Fund, or in the case of a unit of government transferred to the appropriate fund of such governmental unit. "Money recovered" shall include damages, penalties, attorney's fees, costs, or any other monetary payment made by any defendant by reason of any decree or settlement in an antitrust action prosecuted by the Attorney General.

Section 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 8. Section 16.101, Florida Statutes, is hereby repealed.

Section 9. This act shall take effect upon becoming a law.

FILED
Jun 24 12 59 PM '76

STATE OF FLORIDA

OFFICE OF GOVERNOR REUBIN O'D. ASKEW

BRUCE A. SMATHERS
SECRETARY OF STATE

June 24, 1976

Honorable Bruce Smathers
Secretary of State
The Capitol
Tallahassee, Florida 32304

Dear Mr. Secretary:

By the authority vested in me as Governor of Florida, under the provisions of Article III, Section 8, of the Constitution of the State of Florida, I hereby withhold my approval of and transmit to you with my objections Senate Bill 738, enacted by the Fourth Legislature of Florida under the Florida Constitution, 1968 Revision, during the Regular Session of 1976, and entitled:

> "An act relating to legal services for state agencies; amending s. 16.01, Florida Statutes; creating s. 16.055, Florida Statutes; specifying persons to whom the Attorney General may give official opinions; creating s. 16.55, Florida Statutes; authorizing the Attorney General to initiate, maintain, prosecute lawsuits to enforce antitrust laws; creating s. 16.57, Florida Statutes; authorizing the Attorney General to initiate civil litigation, with the approval of the Governor and Cabinet, when no state agency is vested with the authority to enforce such right; providing exceptions and authorizing the Attorney General to file under certain statutes; providing procedure for the Attorney General to initiate civil litigation when a state agency is vested with authority; amending s. 20.11, Florida Statutes; providing that the Department of Legal Affairs may provide legal services to a state agency only upon written request of the head of such agency; creating s. 542.13, Florida Statutes; providing a trust fund for the purpose of funding investigation, prosecution, and enforcement of the provisions of state or federal antitrust laws;

> providing for the allocation of recovered funds; repealing s. 16.101, Florida Statutes, which provides that the Attorney General shall be the reporter for the Supreme Court; providing an effective date."

Committee Substitute for Senate Bill 738 amends chapter 16, Florida Statutes, relating to the duties of the Attorney General. The legislation clarifies the law regarding issuance of legal opinions by the Attorney General. It also establishes a special trust fund for investigation, prosecution and enforcement of state and federal antitrust laws. These are needed improvements in present law which I support.

However, the legislation also contains provisions relating to civil litigation enforcement authority which could be interpreted to result in a fundamental change in executive responsibility. The bill provides that when a state agency is vested with civil litigation enforcement authority, the Attorney General shall obtain the written concurrence of the agency vested with such authority prior to commencing any civil litigation. It further provides that when an agency having enforcement authority refuses to approve the commencement of civil litigation, the Attorney General shall obtain the approval of the Governor and Cabinet prior to commencing such civil litigation.

The phrase "approval of the Governor and Cabinet" presents a problem of interpretation. The bill does not specify whether a simple majority vote of the Governor and Cabinet collectively is required. The phrase could be construed to require approval by the Governor plus a majority of the six-member Cabinet. Although under present law certain decisions relating to the Governor and Cabinet require affirmative action by the Governor, such as selection of the executive director of the Department of Criminal Law Enforcement or decisions of the Administration Commission, there is presently no decision requiring affirmative action by the Governor and four members of the Cabinet. Therefore, the most likely interpretation is that a simple majority vote is required.

The importance of enforcement through civil litigation in the administration or executive responsibilities is obvious.

Senate Bill 738 would appear to permit final enforcement decisions to be made by four members of the Cabinet without the concurrence of the Governor in all areas of executive branch responsibility. This would include areas such as health, transportation, environmental regulation, budget and personnel administration where the Governor presently is charged with sole responsibility. I have discussed the problem of legal interpretation with the Attorney General and he concurs in this conclusion. Whether or not this was the legislative intent, it would constitute a fundamental change contrary to the public interest.

An additional very serious problem with Senate Bill 738 is that it restricts the authority of the Attorney General to initiate civil litigation to protect the public's right to know. The bill would require approval by the Governor and Cabinet for enforcement through civil litigation of the public record's law, Chapter 119, Florida Statutes. I believe this area is so vital to the public interest that an Attorney General should not be encumbered in any way to institute such proceedings.

For the above reasons, I am withholding my approval of Senate Bill 738, Regular Session of the Legislature, commencing on April 6, 1976, and do hereby veto the same.

Sincerely,

Governor

ROA/mdk

MEMORANDUM

RE: CS/SB 738

This bill alters and restricts the powers of the Attorney General and creates an antitrust revolving trust fund. Section 4 creates §16.57, F.S., which provides for three categories of civil lawsuits to be filed by the Attorney General. The first category unnecessarily, and possibly unconstitutional provisions when no agency has such authority. In particular, the Attorney General would be deprived of the authority to enforce, without Governor and Cabinet approval, the Public Records and Sunshine laws. Experience has shown that without this independent and vigorous authority of the Attorney General, Florida's open government laws would not be effective. The second category authorizes the Attorney General to independently file under the enumerated chapters.

The third category requires the Attorney General to receive concurrence, prior to filing the lawsuit, from the agency vested with authority to enforce a statutory or constitutional provision. If the agency refuses to concur, the Attorney General may override that decision by seeking approval from the Governor and Cabinet.

This provision makes no distinction between agencies placed under the direct control and administration of the Governor and of the Governor and Cabinet. It is the apparent, although unstated, legislative intent to have any four individuals of the Governor and Cabinet vote on decisions made by agencies under the Governor's direct

administration. This failure to recognize the distinction between gubernatorial agencies and governor and cabinet agencies raises a conflict with Art. IV, §6, Fla. Const. (1968), and creates a constitutional defect. This constitutional restraint mandates that the administration of all departments be placed, in pertinent part, under either the Governor or the Governor and Cabinet. The constitution expressly prohibits the Legislature from granting the Governor and Governor and Cabinet concurrent jurisdiction over agencies under their respective power, control, and administration.

The veto of CB/SB 738 is not directed at §3 relating to antitrust litigation. Chapters 542, and 16, F.S., Art. IV, §4, Fla. Const. (1968) and the common law brought forward by Ch. 2, F.S., presently provide the same authority.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foreoging BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI and APPENDIX thereto, has been furnished, by U.S. Mail, to the following:

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1778

STANDARD OIL COMPANY OF CALIFORNIA; AMERADA HESS CORPORATION; GULF OIL CORPORATION; MARATHON OIL COMPANY; PHILLIPS PETROLEUM COMPANY; and STANDARD OIL COMPANY (OHIO),
Petitioners,

vs.

STATE OF FLORIDA EX REL. SHEVIN,
Respondent.

REPLY BRIEF

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REPLY BRIEF

Respondent correctly recognizes that review is sought in this case because it involves "an important question of federal law which has not been, but should be, settled by this court" (Rule 19(1)(b))—namely, the standards for proper utilization of the emerging certification procedure. Nothing in the Brief in Opposition detracts from the importance of that question, or the appropriateness of this case for its review.

Contrary to respondent's suggestion, the standards governing certification are not "well-defined" (Br.in Opp., p. 11). The Attorney General points to nothing in this

form their decisions. Decisions such as that below make clear that greater direction by this Court is essentially required to insure the full realization of the benefits of the "remarkably helpful certification procedure" *(Martinez* v. *Rodriquez* (5 Cir. 1969) 410 F.2d 729, 730).

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